THE PROSECUTOR'S MANUAL

Chapter 23

Defenses

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DEFENSES

I. INTRODUCTION

The following materials on defenses and discovery tactics are intended to be a rough guide to assist new prosecutors in anticipating and meeting some of the more common defenses. These materials are not intended to be an all-inclusive treatment of any given area.

II. RULE 15 NOTICE OF DEFENSES

A. Defendant's Duty to Disclose

1. Rule 15.2

The underlying principle of the criminal discovery rules is adequate notification to the opposition of a party's case-in-chief in return for reciprocal discovery to avoid undue delay and surprise at trial by both sides. To be effective, the rules must be applied with equal force to both the state and the defense. *State v. Williams*, 121 Ariz. 218, 220, 589 P.2d 461, 463 (App. Div. 2 1978). Accordingly, the defense has its own duty to disclose codified in the Rules of Criminal Procedure. Rule 15.2(b) of the Arizona Rules of Criminal Procedure provides:

> Within the time specified in Rule 15.2(d), the defendant shall provide a written notice to the prosecutor specifying all defenses as to which the defendant intends to introduce evidence at trial, including, but not limited to, alibi, insanity, self-defense, defense of others, entrapment, impotency, marriage, insufficiency of a prior conviction, mistaken identity, and good character. The notice shall specify for each listed defense the persons, including the defendant, whom the defendant intends to call as witnesses at trial in support of each listed defense. It may be signed by either the defendant or defendant's counsel, and shall be filed with the court.

The comment to Rule 15.2(b) states that the intention of the notice is to provide a broad disclosure of the defendant's case, including all matters he will present at trial, by his own testimony or other evidence, and any rebuttal of the state's case**.** However, the disclosure requirement is limited to matters as to which the defendant will introduce evidence and does not require the defendant to warn the state of deficiencies in its case that do not require presentation of defense evidence. *Id*.

Additionally, the rules specifically provide that the defendant is required to disclose to the State not only the defenses that he will rely upon at trial but also the names, addresses and statements of any witnesses that he intends to call. Rule 15.2(c).

2. Information Not Covered By Rule 15.2

The defendant is not required to provide the state with a preview of his arguments, nor any advance notice of evidence that the state should present to sustain its burden of proof. *State v. Marshall*, 197 Ariz. 496, 501, 4 P.3d 1039, 1044 (App. Div. 1 2000). Moreover, the defense is not required to provide the state with its witness statements to be used solely for impeachment

and the fact that such statements may be used inaccurately will not justify an order requiring disclosure under Rule 15.2. *Osborne v. Pinal County Superior Court*, 157 Ariz. 2, 5, 754 P.2d 331, 334 (App. Div. 2 1988).

The defendant is required to disclose information in the custody of its agents but defense witnesses do not become an agent of the defendant simply by cooperating with that party. Thus, the defendant will not be held responsible for that witness' failure to comply with the prosecutor's demands. *State v. Stoglin*, 116 Ariz. 91, 94, 567 P.2d 1220, 1223 (App. Div. 1 1977).

3. Continuing Duty to Disclose

Both the defendant and the State have a continuing duty to make disclosures as each discovers additional information or material which would have been subject to disclosure had it been known at the time of the original filing of disclosure. Rule 15.6. See also Rule 15.2 comment (2003 amendment).

B. Sanctions for Failure to Disclose

The question arises concerning what to do in the event that the defendant fails to comply with the requirements of Rule 15.2 concerning defenses and witnesses. Rule 15.7 of the Arizona Rules of Criminal Procedure specifically provides that the court may, if a party fails to comply with the discovery rules, impose any one of several sanctions. The court must order disclosure of the information not previously disclosed, and may impose the following sanctions: (1) grant a continuance, (2) hold the witness, party, or counsel in contempt, (3) preclude a party from calling a witness, offering evidence, or raising a defense not disclosed, (4) impose costs of continuing the proceedings, (5) declare a mistrial when necessary to prevent a miscarriage of justice, or (6) any other appropriate sanction. Rule 15.7(a).

Importantly, Rule 15.7(c) goes on to provide that if the defendant fails to comply with his disclosure obligations under Rule 15.2, the prosecution need make no further disclosure except for material or information which tends to mitigate or negate the defendant's guilt as to the offense charged.

When reviewing possible sanctions of a defendant's failure to disclose, the court will consider (1) the reasons why the disclosure was not made, (2) the extent of any prejudice to the state, (3) the feasibility of rectifying such prejudice by continuance, and (4) any other relevant circumstances. *State v. Scott*, 24 Ariz.App. 203, 205, 337 P.2d 40, 42 (App. Div. 2 1975).

In *State v. Lawrence*, 112 Ariz. 20, 23, 536 P.2d 1038,1041 (1975), the court held that where the defendant's notice of defenses and disclosure was wholly inadequate, it was appropriate for the trial court to deny the defendant's motion for additional discovery.

In *State v. Scott*, 24 Ariz. App. 203, 205, 537 P.2d 40, 42 (App. Div. 2 1975), the court held that a defense attorney has a duty to disclose a witness' existence to the prosecution as soon as their materiality is known. It is no excuse to fail to disclose such evidence because counsel came into the case on a late date; the court may draw a justifiable inference of bad faith from such action.

When a defendant obtains knowledge of defense witnesses close to trial, especially in cases where the defense is alibi, counsel has a duty to ask permission of the court to call the witness at the time he obtains knowledge about them. *State v. Dodd*, 101 Ariz. 234, 237, 418 P.2d 571, 574 (1966).

C. Commenting on the Defendant's Failure to Disclose

An equally important provision appears in Rule 15.4(c) of the Arizona Rules of Criminal Procedure. This provision provides as follows:

> The fact that a witness's name is on a list furnished under this rule, or that a matter contained in the notice of defenses is not raised, shall not be commented upon at the trial, unless the court on motion of a party, allows such comment after finding that the inclusion of a witness's name or defense constituted an abuse of the applicable disclosure rule.

These rules, in combination, provide the prosecutor with some recourse in those cases in which the defendant refuses to comply with the discovery provisions. Obviously, in some cases, the defendant's failure to comply is inadvertent. However, in other cases, the defendants, through their counsel, intentionally attempt to subvert the letter and spirit of the discovery rules.

If a prosecutor is confronted with the situation where the defense makes no disclosures and fails to list the defenses that will be relied upon at the time of trial, he may file a motion, pursuant to Rule 15.2, requesting that the court order the defense to make an immediate disclosure, assuming that the arraignment is 20 days or more past, listing the defenses he will rely upon and the witnesses who will be called to testify concerning each of these defenses.

If the defense fails to comply, the State may also move, pursuant to Rule 15.7, for sanctions including an order that the defendant be precluded from introducing any defensive evidence or calling any witnesses not previously listed or disclosed.

Sometimes defendants will list numerous inconsistent defenses. The defense may also list numerous witnesses with little information concerning names, addresses, etc. If the prosecutor feels that the defense is intentionally violating and abusing the discovery rules, he may move, pursuant to Rule 15.4, for an order that he be allowed to comment at the time of trial, upon the inclusion of the witness's names or the numerous defenses disclosed. The State's motion for such an order may be sufficient to cause the defense to correct the abusive disclosures. If not, perhaps the judge can be persuaded to allow the comment, which can be devastating in terms of the defense trial strategy.

III. SELF-DEFENSE

The law of self-defense is set forth in A.R.S. § 13-404, which deals with the use or threatened use of physical force. The question of whether or not a person is justified in using or threatening to use deadly physical force is dealt with in A.R.S. § 13-405. Essentially, if a person is authorized to use or threaten to use physical force pursuant to § 13-404, and, a reasonable person would believe that deadly physical force is immediately necessary to protect himself against the other person's use or attempted use of unlawful deadly physical force, then the use or threatened use of deadly physical force is legally permitted.

Therefore, A.R.S. § 13-404 (in conjunction with § 13-405) provides that a person is justified in threatening or using physical force or deadly physical force against another:

> when and to the extent a reasonable person would believe that physical force is immediately necessary to protect himself against the other's use or attempted use

of unlawful physical force.

A.R.S. § 13-404 goes on to provide that the threat or use of physical force (or deadly physical force under § 13-405) against another is not justified;

> 1. In response to verbal provocation alone; or
>
> 2. To resist an arrest that the person knows or should know is being made by a peace officer or by a person acting in a peace officer's presence and at his direction, whether the arrest is lawful or unlawful, unless the physical force used by the peace officer exceeds that allowed by law; or
>
> 3. If the person provoked the other's use or attempted use of unlawful physical force, unless:
>
> (a) The person withdraws from the encounter or clearly communicates to the other his intent to do so reasonably believing he cannot safely withdraw from the encounter; and
>
> (b) The other nevertheless continues or attempts to use unlawful physical force against the person.

A. Proving Self-Defense

1. Burden of Proof

Justification is not an affirmative defense that the defendant must prove. *State v. King*, 225 Ariz. 87, ¶ 6, 235 P.3d 240, 242 (2010). The defendant must first raise the issue of self-defense; however, he need present only the slightest evidence in order to raise the defense and require the submission of the issue to the jury. *See State v. Fields*, 92 Ariz. 53, 373 P.2d 363 (1962). "Slightest evidence" is a low standard that "tends to prove a hostile demonstration which might be reasonably regarded as placing the accused in imminent danger of losing his life or sustaining great bodily harm." *King*, 225 Ariz. at ¶15, 235 P.3d at 243; *State v. Buggs*, 167 Ariz. 333, 335, 806 P.2d 1381, 1383 (App. Div. 1 1990).

In this regard, it has been held that it was appropriate to refuse to instruct on self-defense, unless the defendant testified, where no other evidence of self-defense had been presented. *State v. Clayton*, 109 Ariz. 587, 595, 514 P.2d 720, 728 (1973).

However, once the defendant has introduced the slightest evidence that he acted in self-defense, it is the State's burden to prove beyond a reasonable doubt that the defendant did not act in self-defense. *Everett v. State*, 88 Ariz. 293, 297, 356 P.2d 394, 397 (1960). *See also King, supra*.

2. Evidence Needed for Self-Defense Instruction

A self-defense instruction must be given if the defendant demonstrates that he reasonably believed he was in immediate physical danger and he used no more force than appeared reasonably necessary under the circumstances. *State v. Gilfillan*, 196 Ariz. 396, 406, 998 P.2d 1069,1079 (App. Div. 1 2000).

The defendant need not present evidence of each element of self-defense in order to receive a self-defense instruction because the state bears the burden of proving the defendant did not act

with justification. *State v. King*, 225 Ariz. 87, ¶14, 235 P.3d 240, 243 (2010).

a. Reasonable Belief of Danger

Self-defense is available only if there is a reasonable belief of danger. It has been said that the belief must be one that a reasonable man, not the defendant, would have under the circumstances. Unreasonable belief, even if an honest mistake by the defendant, will not support the defense of self-defense. *State v. Tuzon*, 118 Ariz. 205, 209, 575 P.2d 1231, 1235 (1978).

b. Immediate Danger

The reasonable belief has to be one of an immediate danger. The mere fear of some future danger is insufficient to entitle a defendant to exercise the right of self-defense. *State v. Buggs*, 167 Ariz. 333, 336, 806 P.2d 1381, 1384 (App. Div.1 1990). Moreover, the threat or potential danger that the defendant seeks to rely upon as a basis for his claim of self-defense must be one that a reasonable person would perceive as such under the circumstances. *See e.g. Everett v. State*, 88 Ariz. 293, 356 P.2d 394 (1960); *State v. Corrao*, 115 Ariz. 55, 563 P.2d 310 (1977).

For example, in *Corrao*, the court pointed out that although the victim was abusive and obnoxious, he was totally intoxicated, therefore, it was reasonable for the jury to find that a reasonable person would not have perceived a threat or danger that would be sufficient to invoke a claim of self-defense. 115 Ariz. at 57, 563 P.2d at 312.

Although actual danger is unnecessary if a reasonable person would perceive the existence of an apparent danger, it is important to note that the right of self-defense lasts only so long as the danger, or the reasonably apparent danger, exists. *State v. Barker*, 94 Ariz. 383, 389, 385 P.2d 516, 520 (1963).

c. No Excessive Force

Another requirement of the defense of self-defense is that the defendant use no more force than is reasonably necessary under the circumstances. *State v. Eddington*, 95 Ariz. 10, 13, 386 P.2d 20, 21 (1963). Clearly, the use of excessive force will render the defendant's claim of self-defense inappropriate. One should keep in mind, however, that the question of whether or not the defendant used excessive force is one for the jury. *State v. Fields*, 92 Ariz. 53, 60, 373 P.2d 363, 368 (1962); *State v. Montijo*, 97 Ariz. 167, 398 P.2d 551 (1965).

It should also be noted that the mere fact that the defendant was armed at the time does not mean that he is not entitled to the defense of self-defense. *State v. Jackson*, 94 Ariz. 117, 122, 382 P.2d 229, 233 (1963). Moreover, the defendant is not required to retreat before acting in self-defense, even if safety might more easily be gained by the defendant's retreat. *Id*.

d. Sole Motivation

Previously, Arizona courts held that a defendant must have acted solely out of self-defense in order to obtain a self-defense instruction. *See e.g. State v. Gilfillan,* 196 Ariz. 396, 406, 998 P.2d 1069,1079 (App. Div. 1 2000).

However, the Arizona Supreme Court disapproved of those cases, finding that nothing in A.R.S. § 13-404 requires the defendant be motivated solely by fear of imminent harm in order to claim self-defense at trial. *State v. King*, 225 Ariz. 87, ¶7, 235 P.3d 240, 242 (2010). The defendant's motivation is a subjective standard at odds with the objective reasonable person standard set

forth in the statute. "Thus, the sole question is whether a reasonable person in the defendant's circumstances would have believed that physical force was 'immediately necessary to protect himself.'" *Id*. at ¶12, 235 P.3d at 243.

e. Sufficient Evidence for Instruction

The following are sample cases in which appellate courts found the defendant produced sufficient evidence to warrant a self-defense instruction:

In a domestic violence case, the court found sufficient evidence to raise self-defense in an aggravated assault trial where the victim had prior arrests and one prior conviction for domestic violence toward the defendant, the victim suffered from a mental illness that predisposed him to violent behavior, and the defendant placed a 911 call to police for help because the victim was beating her and threatening her with a knife. *State ex rel. Romley v. Superior Court In and For County of Maricopa,* 172 Ariz. 232, 238, 836 P.2d 445, 451 (App. Div.1 1992).

In a murder case, the court found the defendant's theory that he killed the victim while acting in self-defense was reasonably supported by the evidence, and thus, defendant was entitled to jury instruction on self-defense and the justified use of deadly physical force. Defendant testified he had not provoked the altercation, but claimed that the victim came at him with a knife after he picked up a third person's gun. *State v. Karr*, 221 Ariz. 319, 212 P.3d 11 (App. Div. 1 2008).

f. Insufficient Evidence for Instruction

The following are sample cases in which appellate courts found the defendant failed to produce sufficient evidence to warrant a self-defense instruction:

Defendant failed to present quantum of evidence necessary to warrant self-defense instruction, in an aggravated assault case arising out of altercations defendant had with police officer because no reasonable person could have inferred from evidence presented that defendant's conduct was justified. Defendant did not testify or present any evidence. He relied solely on the cross-examination of the state's witnesses to support his assertion that he presented sufficient evidence to raise reasonable doubt as to whether his conduct was justified. Evidence presented by state was largely uncontradicted. *State v. Walters*, 155 Ariz. 548, 554,748 P.2d 777, 783 (App. Div.1 1987).

B. Self-Defense Unavailable

1. Defendant Denies Use of Force

There is no evidence to justify the presentation of a self-defense instruction if the defendant denies the killings. *Judd v. State*, 41 Ariz. 176, 195, 16 P.2d 720, 727 (1932); *State v. Dixon*, 15 Ariz.App. 62, 64, 485 P.2d 1179, 1181 (App. Div. 2 1971).

2. Defendant Provoked the Conflict

a. Provocation Forfeits Right of Self-Defense

"An essential element of self-defense is the accused's freedom from fault in provoking difficulty that gives rise to use of force." *State v. Zamora*, 140 Ariz. 338, 341, 681 P.2d 921, 924 (App. Div. 1 1984).

The general rule has been that the defense of self-defense is not available where the defendant provokes the difficulty resulting in the death, *State v. Jones*, 95 Ariz. 4, 385 P.2d 1019, 1021 (1963), or where the defendant creates a situation requiring self-defense. *State v. Moore*, 112 Ariz. 271, 276, 540 P.2d 1252, 1257 (1975). For instance, the defendant who killed the victim during the commission of a kidnap was held not to be entitled to claim self-defense. *Jones*, *supra*.

A defendant's actions must be willingly and knowingly calculated to lead to conflict before they may cause forfeiture of his fundamental right of self-defense. *State v. Jackson*, 94 Ariz. 117, 121, 382 P.2d 229, 232 (1963).

If the defendant is the aggressor or provokes the difficulty in which he kills his assailant, he cannot invoke the right of self-defense to justify or excuse the homicide unless he in good faith withdraws from the combat in such a manner as to show his adversary his intention in good faith to desist. *State v. Myers*, 59 Ariz. 200, 206, 125 P.2d 441, 444 (1942).

b. Cases Showing Defendant is Aggressor

In *State v. Williams*, 132 Ariz. 153, 156, 644 P.2d 889, 892 (1982), the court upheld the trial court's instruction to the jury that the defendant was not entitled to claim self-defense where he provoked the difficulty. This was a jail assault case, and the court found that poor jail conditions did not justify the defendant's assaultive behavior. *See also State v. Sourivathong*, 130 Ariz. 461, 463, 636 P.2d 1243, 1245 (App. Div. 2 1981)(uncontroverted evidence that defendant provoked difficulty); *State v. Lujan*, 136 Ariz. 102, 104, 664 P.2d 646, 648 (1983)(defendant was a part of a "continuing aggression" against victim).

In *State v. Mohr*, 106 Ariz. 402, 403, 476 P.2d 857, 858 (1970), photographs showing six stab wounds were admitted in order to show that the victim was helpless when killed and, therefore, the defendant was the aggressor. *See also State v. Briggs*, 112 Ariz. 379, 542 P.2d 804 (1975)(a bloody shirt showing numerous stab wounds); *State v. Soule*, 121 Ariz. 505, 591 P.2d 993 (App. Div. 1 1979)(evidence of six stab wounds, four of which could have been fatal, were sufficient to show malice and negate the defendant's claim of self-defense).

3. Withdrawal From Conflict

An aggressor may not claim self-defense unless he withdraws from combat in a manner that will indicate his intention in good faith to refrain from further aggressive conduct. *State v. Lujan*, 136 Ariz. 102, 104-05, 664 P.2d 646, 648-49 (1983).

Defendant was not entitled to a self-defense instruction for firing a pistol at men who had recently been kicking him while he was on the ground because at the time the defendant returned to scene after obtaining the pistol, the men were not advancing upon him or physically menacing him in any way. Defendant's belief that the victims were highly dangerous individuals who meant to do him harm at some later time was insufficient basis for self-defense. *State v. Buggs*, 167 Ariz. 333, 336, 806 P.2d 1381, 1384 (App. Div.1 1990).

Defendant charged with aggravated assault did not effectively withdraw from encounter where he dropped shotgun just prior to encounter with victim, but did not communicate any intent to

withdraw to victim and could not say why he dropped the gun. *State v. Kelly*, 149 Ariz. 115, 117,716 P.2d 1052, 1054 (App. Div.2 1986).

4. Duty to Retreat

One who is in the place where he has a right to be is not required to retreat but may defend himself with deadly force in order to avoid great bodily harm. However, a defendant is not entitled to a specific instruction on this issue if another instruction adequately covers the same theory. *State v. Palomarez*, 134 Ariz. 486, 488, 657 P.2d 899, 901 (App. Div.2 1982).

In *State v. Britson*, 130 Ariz. 380, 385-86, 636 P.2d 628, 633-34 (1981), the court held that a defendant may not rely upon the defense of self-defense where he first retreats from a place of danger and then returns when the return is deliberately calculated to lead to further conflict.

In *State v. Powers*, 117 Ariz. 220, 227, 571 P.2d 1016, 1023 (1977), the court pointed out that after contact between the defendant and the victim had been broken, the defendant could not pursue and kill the victim and claim self-defense merely because he was once in fear.

5. Third Person Injured or Killed

One is not entitled to take a third person hostage in self-defense, *State v. Banks*, 24 Ariz.App. 369, 371, 539 P.2d 173, 175 (App. Div. 2 1975), nor, as is pointed out in A.R.S. § 13-401(A), will a person be relieved of responsibility for recklessly injuring or killing an innocent third person, even if the person was otherwise justified in threatening or using physical force or deadly physical force against another.

C. Admissible Evidence

1. Peaceful Character of Defendant or Victim

Once the issue of self-defense has been raised, a question arises concerning what type of evidence is admissible. It has been held that precluding the defendant from admitting evidence of his peaceful character constitutes reversible error. *State v. Kaiser*, 109 Ariz. 244, 246, 508 P.2d 74, 76 (1973). However, the State is entitled to show the defendant's bad character in order to rebut his evidence that he was/is a peaceful fellow. *Id*.

It has also been suggested that the State is entitled to show the deceased's reputation for peace and quietude when the defendant raises the issue of self-defense. However, the State, on a more careful note, should not attempt to introduce evidence concerning the deceased's reputation for peace and quietude unless the defendant, urging his claim of self-defense, attacks the deceased's reputation and suggests that the deceased was belligerent, violent and stormy. See *Burnett v. State*, 34 Ariz. 129, 136, 268 P. 611, 614 (1928).

2. Victim's Reputation for Belligerence

The Arizona Supreme Court has held that the defendant's knowledge of the victim's character prior to the assault is a condition precedent to the giving of an instruction authorizing the jury to consider the victim's reputation in passing upon the defendant's plea of self-defense. *State v. Eddington*, 95 Ariz. 10, 14, 386 P.2d 20, 22 (1963).

A victim's character is not an essential element of self-defense. *State v. Fish*, 222 Ariz. 109, 119, 213 P.3d 258, 268 (App. Div. 1 2009). If there is a question regarding who is the aggressor, the reputation of the victim for belligerence would be admissible even if not known to the defendant. *Id*. *See also State v. Intogna*, 101 Ariz. 275, 419 P.2d 59 (1966)(the reputation of the victim from meanness when intoxicated was held to be admissible).

3. Victim's Specific Acts of Violence

a. Defendant Knows About Victim's Acts

A defendant claiming self-defense may introduce evidence of the victim's previous specific acts of violence if the defendant either observed the acts himself or was informed of acts before the assault in order to show he was justifiably apprehensive of the victim and knew that the victim had a violent disposition. *State v. Taylor*, 169 Ariz. 121, 124, 817 P.2d 488, 491 (1991).

Additionally, the victim's threats and acts of aggression toward the defendant have been held to be admissible if known to the defendant at the time of the incident. *State v. Wallace*, 83 Ariz. 220, 224, 319 P.2d 529, 532 (1957). However, the victim's past acts do not dispense with or dilute the requirement that deadly force may be used only if necessary to prevent an immediate harm. *State v. Buggs*, 167 Ariz. 333, 337, 806 P.2d 1381, 1385 (App. Div. 1 1990).

b. Defendant Unaware of Victim's Acts

Generally, evidence of the victim's specific acts of violence is inadmissible under Rule 404(a) unless the victim's character is an essential element of a claim or defense under Rule 405(b) or the evidence is admissible under Rule 404(b). *State v. Fish*, 222 Ariz. 109, 117, 213 P.3d 258, 266 (App. Div. 1 2009). As stated above, evidence of the victim's character is admissible to establish the initial aggressor without the defendant's knowledge of the specific acts; However, that evidence is limited to the victim's general reputation and not specific acts because the victim's character is not an essential element of self-defense. *Id*. at 118, 213 P.3d at 267. Specific act evidence is also inadmissible to show a defendant's reasonable belief of immediate danger if he was unaware of the victim's prior acts at the time of the altercation. *Id*. at 121, 213 P.3d at 270.

Beware that even if the defendant is limited to reputation evidence at trial, the state may open the door to the admission of specific act evidence to rebut an argument that the defendant fabricated or exaggerated the victim's acts at the time of the fight. *Id*. at 124, 213 P.3d at 273.

Finally, it has been held that the victim's violent acts towards third persons are admissible to show the defendant's fear was reasonable or that the victim was violent and turbulent, even where those acts were not observed by or known to the defendant at the time of the incident. *State v. Young*, 109 Ariz. 221, 223, 508 P.2d 51, 53 (1973).

4. Defendant's Threats Toward Victim

Likewise, the defendant's threats toward the victim, a class of persons to which the victim belongs, or related threats to third persons, are admissible to show the defendant's motive and intent, or to rebut the defendant's claim of self-defense. *See State v. Moore*, 111 Ariz. 355, 529 P.2d 1172 (1974)(threats to kill game warden if caught were admissible).

D. Other Justification

Finally, one word of caution concerning some of the other provisions of Chapter 4, having to do with justification. In *State v. Barr*, 115 Ariz. 346, 349, 565 P.2d 526, 529 (App. Div. 2 1977), the court held that the use of deadly force by a private citizen is not justified based merely upon the reasonable belief that a felony has been committed. The court pointed out that the use of deadly force by a private citizen is justified only when a felony has actually been committed. And then, the use of deadly force is justified only if it is or reasonably appears to be necessary for the apprehension of the felon, and then, only when the felony is one which reasonably creates a fear of great bodily injury.

IV. PREPARING TO MEET THE DEFENDANT'S SELF-DEFENSE CLAIM

The following materials were prepared by the Honorable John Roll, when he was a prosecutor with the Pima County Attorney's Office.

In order for the State to effectively meet a claim of self-defense, it is necessary that law enforcement officers learn to anticipate when the defense of self-defense is likely to be raised, and to conduct the investigation accordingly. When self-defense appears to be a likely defense, the matters set forth below should be investigated and ascertained.

A. Investigating a Possible Self-Defense Claim

1. Defendant's Demeanor at Time Police Arrived

The demeanor of the defendant immediately upon arrival of law enforcement officers should be ascertained. Thus, if the defendant was unruly or quarrelsome with police officers shortly after the incident, this evidence may tend to indicate to the jury that the defendant had a similar attitude or disposition before the police arrived.

2. Defendant's Demeanor at Time of Conflict

The demeanor of the defendant at the time of the incident or as close thereto as any third party had an opportunity to observe the defendant is important, particularly as to the issue of the identity of the aggressor. Again, unruly or belligerent conduct on behalf of the defendant may point to the defendant as the likely instigator of the assault.

3. Defendant's State of Mind at Time of Conflict

The defendant's claimed state of mind as his reason for resorting to self-defense can be extremely important. Even if the defendant deliberately distorts his state of mind, his statements may assist the prosecution because they cannot be reconciled with other evidence. Accordingly, the defendant should be asked questions such as: "Did you think Mr. Smith was going to hurt you? Did you think Mr. Smith had a weapon? Did you ever consider walking away from the conflict? Were you afraid of Mr. Smith at the time you took this action against him? Have you ever had any violent confrontation with Mr. Smith before this conflict? Had Mr. Smith ever threatened you, and if so, how? What exactly did Mr. Smith do to place you in fear of bodily harm prior to and during this conflict? Did there ever come a time during this confrontation that you knew you

had the situation under control and Mr. Smith was no longer a threat? When?" Questions of this nature will serve the function of limiting the defendant to a specific version of the incident. Accordingly, even if he chooses to lie about his perceptions at the time of the assault, his statements can be very useful. The defendant's statements can remove his flexibility at trial insofar as preventing him from tailoring his testimony to fit the evidence.

4. History of Relationship Between Defendant and Victim

The existence and nature of any prior disputes or quarrels between the defendant and the victim should be ascertained from acquaintances, neighbors, friends and relatives of participants to the conflict. This aspect of the investigation may serve the purpose of preventing acquaintances, neighbors, friends and relatives of the defendant from deciding, as trial draws near, that the victim in some way harbored a grudge against the defendant. This aspect of the investigation may also reveal evidence of previous hostilities expressed physically and/or verbally by the defendant against the victim. The precise nature of the past and present relationship of the defendant to the victim should be ascertained. If the defendant and victim are or have ever been lovers, competitors, relatives, etc., a motive for the defendant's attempt to harm the victim may exist.

5. Injuries to the Defendant or Lack Thereof

The police should be instructed to always inquire of a defendant in a case likely to involve a claim of self- defense, whether the defendant has been injured, where, and to what extent. In this regard, medical attention, including hospitalization, should be offered. This action may prevent, or at least contradict, a claim by the defendant at trial that he was significantly harmed by the victim in the course of a conflict. Additionally, if the defendant is examined by medical personnel, the diagnosis or conclusion of the medical personnel may be far less impressive than the injuries claimed to have been suffered by the defendant.

6. Preparation: Consultation With Expert Witnesses

Preparation for trial should include pre-trial interview of any expert witnesses with knowledge of the case, including but not. limited to medical doctors. In this regard, a doctor who has examined the defendant and/or the victim, may have invaluable knowledge as to the existence and nature of any injuries. For example, in the case of a fatal shooting, a pathologist who has examined the body of the victim may have knowledge of the distance from which a weapon was fired toward the victim as well as the path or angle of the bullet. Such objective evidence may seriously tend to undermine the defendant's version of the fatal confrontation and disprove the claimed self-defense. In the case of a fatal stabbing with a knife, a pathologist who has examined the body of the victim may be able to render an opinion, based upon the nature and location of the wounds, whether the wounds were inflicted when the victim was in an offensive or defensive position.

B. Disproving The Claim of Self-Defense

1. Self-Defense: A Difficult Defense to Rebut

Self-defense can be a difficult defense to disprove. Often, the only witnesses to the confrontation are the defendant and the victim and the conflict arises in a sordid setting with little or no jury

appeal. The defense lawyer may successfully introduce evidence that the victim was an individual of violent and generally disreputable character. Such evidence, though not constituting a legal defense, may tend to minimize or diminish the significance of the defendant's assault upon the victim in the collective mind of the jury.

2. Direct Evidence

a. Victim's Testimony

In situations in which the victim is available to testify at trial, emphasis should be placed upon the lack of motive on the victim's part to require the defendant to resort to force in self-defense. Thus, testimony that the victim had never seen the defendant before, or at least had never quarreled with the defendant previously, should be emphasized. Even if circumstances afforded the victim an apparent motive to assault the defendant, circumstances such as cooperation with the police, and the improbability of the victim voluntarily selecting the attendant time, place and circumstances for a confrontation with the defendant may tend to disprove the victim as the aggressor. Testimony that the victim feared the defendant and shunned contact with him prior to the dispute for which the defendant is on trial should be emphasized. Evidence of this nature may be sufficient to convince a jury that it is highly improbable that the victim initiated the conflict. Testimony should be elicited, when applicable, that the victim knew the defendant was armed with a weapon or had friends or family nearby prior to the conflict. Again, such evidence may convince the jury that the victim was not the instigator of the dispute.

b. Eyewitness Testimony of Bystanders

In the event bystanders observed the confrontation in issue, they may, of course, be successfully utilized to corroborate the victim's version of the dispute. In this regard, bystanders may testify to the defendant's belligerent conduct, access to a weapon, or being with other individuals available for support. The bystanders' lack of motive to falsely corroborate the victim's version of the conflict should be underscored. When bystanders testify on behalf of the defendant, aside from challenging the impartiality of the bystanders, the prosecutor may wish to emphasize the lack of knowledge of said bystanders as to conversations, threats, etc., prior to the actual physical conflict.

3. Circumstantial Evidence: Whether the Defendant Reasonably Apprehended the Possibility of Bodily Harm to Himself

It is essential that the State analyze and present facts and reasonable inferences from the facts which may controvert the defendant's claim that he reasonably apprehended the possibility of bodily harm to himself. In this regard, circumstantial evidence pertaining to the matters set forth below may be significant evidence tending to rebut a claim that the defendant reasonably apprehended bodily harm to himself.

a. Relative Size, Age and Strength of Participants

Circumstantial evidence concerning the size, age and/or strength of the combatants to the dispute is often important concerning the legitimacy of a claim of self-defense. Thus, if no weapon was involved during the dispute and the victim was a diminutive individual compared to the defendant, a claim that the defendant feared serious bodily injury at the hands of the victim may be poorly received by the jury. Emphasizing a substantial difference in relative age or strength of

the participants to the dispute may also make a claim of self-defense unpalatable to a jury.

b. Weapons - Defendant

If the defendant was armed when the victim was unarmed, this may be important evidence concerning whether the defendant reasonably apprehended bodily harm to himself. Notwithstanding the respective size of the participants, if the defendant was armed with a weapon when the victim was unarmed, it may be unlikely that the defendant was fearful of the victim.

c. Relative Nature of Weapons of Participants

If both the defendant and the victim were armed, but the defendant was armed with an instrument more capable of inflicting serious harm as compared to the victim, or the defendant's weapon was capable of more rapidly inflicting harm, this may constitute significant evidence suggesting that the defendant's apprehension of serious harm was unreasonable, inasmuch as he was in control of the situation. Additionally, the possession of a weapon by the defendant may raise an inference that the defendant had the weapon with him in anticipation and possibly in preparation for a confrontation. The coincidence of the defendant having a deadly weapon in his possession available for use at the time of an unjustified attack by the victim can be emphasized to the jury.

d. Location of Confrontation

The situs or location of a dispute may reflect on whether the defendant reasonably apprehended the possibility of bodily harm. Thus, if the defendant sought the victim out for a confrontation, the extent to which the defendant feared the victim may be called into question. Additionally, the seeking out of the victim may indicate that the defendant created a situation involving a conflict in order to claim self-defense. *See e.g. State v. Robinson*, 89 Ariz. 221, 230, 360 P.2d 474, 478 (1961).

e. Attempted Withdrawal from Conflict

Evidence of attempts by the victim to terminate the confrontation or to escape before a physical confrontation could occur will go to the reasonableness of the defendant's apprehension of danger, and as to who the aggressor actually was. If physical violence by the defendant exceeded the time in which the defendant was in danger, no legitimate claim of self-defense can be made. *See e.g. State v. Barger,* 167 Ariz. 563, 810 P.2d 191 (App. Div. 1 1990); *State v. Barker*, 94 Ariz. 383, 389, 385 P.2d 516, 520 (1963). If it was no longer reasonable for the defendant to believe himself in danger, no claim of self-defense can be made. *State v. Sands*, 145 Ariz. 269, 700 P.2d 1369 (App. Div. 2 1985); *State v. Eddington*, 95 Ariz. 10, 386 P.2d 20 (1963). Thus, if the defendant rendered the victim harmless at the onset of a physical confrontation, the further infliction of harm upon the victim can in no way be interpreted as being motivated by a reasonable apprehension of bodily harm.

f. Swift or Surprise Assault

If the defendant's assault on the victim was a swift, surprise assault, or an ambush, reasonable

apprehension of danger on the part of the defendant may appear unlikely to the jury. *See e.g. Anderson v. Territory*, 6 Ariz. 185, 56 P. 717 (1899).

g. Condition of Victim

The victim's condition, may militate against a claim that the defendant reasonably apprehended danger from the victim. For example, in *State v. Corrao*, 115 Ariz. 55, 56, 563 P.2d 310, 311 (App. Div. 2 1977), the defendant was convicted of an assault upon an abusive, obnoxious, argumentative, intoxicated victim, largely due to the victim's incapacitation from ingestion of alcohol, and resultant inability to pose a threat to the defendant.

h. Condition of Defendant

The defendant's condition, e.g., if the defendant was intoxicated or not fully in control of himself due to the ingestion of drugs or alcohol, may have caused the defendant to misinterpret the actions of the victim, so as to believe that a danger existed whereas a reasonable person would not have believed that a danger existed. In such a case, the defense of self-defense would not be available to the defendant.

i. Demeanor of Victim

The defendant's demeanor immediately following the confrontation, as compared to the demeanor of the victim, may be important evidence on this particular issue. Thus, if the defendant was indifferent or violently aggressive, as compared to a stunned or surprised appearance on the part of the victim, this may constitute circumstantial evidence that the defendant was the aggressor and that the defendant had not, a short time earlier, apprehended bodily injury from the victim. *See e.g. Riley v. State*, 50 Ariz. 442, 73 P.2d 96 (1937).

j. Whether Victim's Conduct Was Reasonably Interpreted as Threatening

Inasmuch as words alone are inadequate to warrant the use of deadly force, ascertainment and analysis of the exact nature of the victim's "alleged" conduct which was the basis for the claim of the defendant's apprehension of danger is important. Thus, e.g., if the defendant claimed that the victim's reaching into his pocket caused apprehension of danger, and the defendant was the only witness to the alleged reaching of the victim into his pocket, if the victim's pocket was empty, the inference may be drawn that the defendant is lying when he claims the victim reached into his pocket because there was no reason for him to reach into his pocket, nor would it appear likely that he reached into his pocket in such a threatening manner as to reasonably cause the defendant fear of bodily harm. *See State v. Fields*, 92 Ariz. 53, 373 P.2d 363 (1962).

k. Number of Potential Participants to Conflict

The number of participants to a dispute may be circumstantial evidence of a defendant's probable lack of apprehension of danger. Thus, if there were several individuals in the defendant's company at the time of the assault on the victim, it may appear highly unlikely to the jury that the victim would have initiated a dispute with the defendant, or that the defendant would have felt threatened by the victim even if the victim initiated the dispute.

4. Circumstantial Evidence: Whether Use of Force Was Reasonably Necessary to Repel the Victim

Also important is analysis and presentation of facts and reasonable inferences therefrom which may controvert the defendant's claim that the defendant, under the circumstances, used force reasonably necessary to repel the assailant.

a. Harmless Victim at Onset

Evidence that the victim was virtually harmless at the time the defendant resorted to physical action against the victim may disprove the defendant's claim of self-defense. Thus, if the victim was too intoxicated to harm anyone, the defendant would not be entitled to use "deadly force against a harmless attack." *Corrao,* 115 Ariz. at 56, 563 P.2d at 311.

b. Victim Incapacitated Early in Conflict

Evidence that the defendant incapacitated the victim at an early stage in the conflict may tend to show that although the defendant was initially permitted to use self-defense against the victim, the defendant's use of force exceeded the time in which the defendant was in danger. *See e.g. State v. Barker*, 94 Ariz. 383, 389, 385 P.2d 516, 520 (1963).

c. Relative Difference Between Injuries to Combatants

Evidence of extensive difference between the injury to the defendant, as compared to the injury to the victim, can be indicative that the defendant used more force than was reasonably necessary to repeal the assault by the victim. *See e.g. State v. Soule*, 121 Ariz. 505, 591 P.2d 993 (App. Div. 1 1979); *Photo of Courts to Refute Self-Defense,* 73 A.L.R.2d 769 at 832 (1960); *Evidence - Clothing of Deceased,* 68 A.L.R.2d 903, 931 (1959). Thus, if the defendant never requested medical attention and/or hospitalization, but the victim was-seriously injured, this may constitute important evidence of potentially excessive force used against the victim. In this regard, evidence that photographs of the defendant showed no bruises, lacerations, etc., can be valuable circumstantial evidence.

d. Alternatives to Physical Conflict

Evidence that the defendant had alternatives to a physical confrontation with the victim, such as turning and walking away from a dispute, moving out of the house, etc., can be important evidence of the lack of necessity for resorting to violence.

5. Circumstantial Evidence: Consciousness of Guilt

Evidence of consciousness of guilt on the part of defendant claiming that he acted in self-defense may tend to show that the defendant did not reasonably apprehend bodily harm to himself, and/or did not act solely under the reasonable apprehension of bodily harm to himself, and/or did not use only that force reasonably necessary to' repeal the assailant. Thus, evidence of consciousness of guilt May, when coupled with other circumstantial evidence, persuade a jury that the defendant is not entitled to avail himself of a claim of self-defense. Evidence of flight,

concealment of self or evidence, misrepresentation of identity, and/or inconsistent statements may be the most difficult evidence for the defendant to satisfactorily explain away at trial.

V. DURESS

A. Proving the Duress Defense

A.R.S. § 13-412(A) sets forth the defense of duress. It provides as follows:

> Conduct which would otherwise constitute an offense is justified if a reasonable person would believe that he was compelled to engage in the proscribed conduct by the threat or use of immediate physical force against his person or the person of another which resulted or could result in serious physical injury which a reasonable person in the situation would not have resisted.

Once a defendant raises a duress defense, the state has the burden to prove beyond a reasonable doubt that he did not act under duress. *State v. Barrios*, 162 Ariz. 146, 148, 781 P.2d 624, 626 (App. Div. 2 1989).

1. Actual and Reasonable Fear

Duress requires the defendant to prove: "(1) that he did in fact believe that his life would be endangered if he did not perform the criminal act complained of, and (2) that this belief held by the defendant was a reasonable one." *State v. Starks*, 122 Ariz. 531, 533, 596 P.2d 366, 368 (1979). "Once the defendant asserts that he was in fact in fear, his conduct is then judged by an objective standard." *Id*.

2. Imminent Danger

In *State v. Jones*, 119 Ariz. 555, 558, 582 P.2d 645, 648 (App. Div. 2 1978), the court said that in order to constitute a defense, the danger or coercion must be "present, imminent and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done."

Although there are few Arizona cases defining imminent danger, it has been implied by the Court of Appeals that the phrase implies a high level of immediacy and a lack of alternatives for the defendant. In a residential burglary case, the court held that the duress defense was not available to a defendant who claimed he was a forced to enter the home because someone shot at him. Taking the defendant's story at face value, no reasonable person would have concluded that it was necessary to forcibly enter the residence when he was hiding undetected behind a wood pile outside the house. *State v. Belyeu*, 164 Ariz. 586, 590, 795 P.2d 229, 233 (App. Div. 2 1990).

In *State v. Kinslow*, the Arizona Supreme Court adopted the U.S. Supreme Court's principle that "if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defenses [of duress and necessity] will fail." 165 Ariz. 503, 506, 799 P.2d 844, 847 (1990), *citing United States v. Bailey*, 444 U.S. 394, 410 (198).

A vague threat will not constitute an immediate danger to the defendant. Even assuming that the testimony of an informant indicating he was a Mafia associate constituted a threat, it did not show immediate coercion sufficient to warrant instruction on a duress defense. *State v. Walker*, 185 Ariz. 228, 240, 914 P.2d 1320, 1332 (App. Div. 1 1995).

B. Duress Defense is Unavailable

A.R.S. § 13-412(B) prohibits a duress defense if the person intentionally, knowingly or recklessly places himself in a situation in which it was probable that he would be subjected to duress.

A defendant who escaped from prison despite a "shoot to kill" order could not avail himself of a duress defense for felonies committed after escaping when he placed himself in that situation. *State v. Kinslow*, 165 Ariz. 503, 799 P.2d 844 (1990).

Moreover, the duress defense under § 13-412 is not available for offenses involving homicide or serious physical injury. "The defense of duress is not available as a substitute for self-defense." *State v. Lamar*, 144 Ariz. 490, 497, 698 P.2d 735, 742 (App. Div. 2 1984). Duress is not a defense to felony murder, *State v. Berndt*, 138 Ariz. 41, 44, 672 P.2d 1311, 1314 (1983), or accomplice liability for murder. *State v. Ellison*, 213 Ariz. 116, 134, 140 P.3d 899, 917 (2006).

Keep in mind, however, that defense evidence may be admissible for other purposes even if it is prohibited to show duress or other justification. *State ex rel. Thomas v. Duncan*, 216 Ariz. 260, 264, 165 P.3d 238, 242 (App. Div. 1 2007).

C. Admissible Evidence

The state may rebut a defendant's claim that he was coerced into participating in a crime by members of a criminal organization with evidence of willing participation in other criminal activities with members of the organization. Such evidence is relevant to show absence of duress and/or intent to participate in the charged crimes. *State v. Linden*, 136 Ariz. 129, 140, 664 P.2d 673, 684 (App. Div. 1 1983).

A trial court may admit evidence tending to show duress in prosecutions for homicide or serious physical injury if that evidence is otherwise admissible for a separate purpose. *State ex rel. Thomas v. Duncan*, 216 Ariz. 260, 264, 165 P.3d 238, 242 (App. Div. 1 2007).

The duress standard is that of what a reasonable person would do under the circumstances. Thus, the defendant's subjective mental state, and evidence regarding such things as a defendant's temporal lobe disorder and mental retardation, are inadmissible. *State v. Starks*, 122 Ariz. 531, 533, 596 P.2d 366, 368 (1979).

D. Duress and Escape

The courts apply a more stringent standard of duress to the crime of escape. In such cases, the defendant must show that each of the following conditions exist: (1) the prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future; (2) there is no time to complain to authorities or a history of futile complaints exists; (3)

there is no time or opportunity to resort to the courts; (4) there is no evidence of force or violence used toward prison personnel; and (5) the prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat. *State v. Wolf*, 142 Ariz. 245, 247-48, 689 P.2d 188, 190-91 (App. Div. 2 1984).

VI. ALIBI

A. Introduction

An alibi is evidence offered in rebuttal to the State's case, and literally means "elsewhere." *Azhill v. State*, 19 Ariz. 499, 501, 172 P. 658, 659 (1918). The defense of alibi constitutes a general denial of the offense by reason of the defendant's having been absent from the place of the offense. This represents some advantage to the prosecutor inasmuch as the alibi defense is inconsistent with most other defenses, including requests for lesser-included offenses. *State v. Wall*, 212 Ariz. 1, 6, 126 P.3d 148, 153 (2006)(alibi is an "all or nothing defense"). *See also State v. Bolton*, 182 Ariz. 290, 310, 896 P.2d 830, 850 (1995)("[W]hen a defendant proffers an alibi defense, the record usually contains little evidence to support an instruction on a lesser-included offense.").

In every criminal case, the State is required to prove the identity of the perpetrator. If the State fails to prove beyond a reasonable doubt that the defendant was the individual who committed the offense, then the defendant is entitled to an acquittal. The defense may rely upon cross-examination of the State's witnesses to demonstrate that the identification of the defendant is faulty, and argue that the State has failed to prove beyond a reasonable doubt that the defendant was the perpetrator. The defendant presenting an alibi defense takes that one step further and offers evidence that he was elsewhere at the time of the commission of the offense.

B. Proving the Alibi Defense

Alibi is not an affirmative defense. The defendant is not required to prove an alibi; he may present alibi evidence to raise a reasonable doubt in the jurors' minds whether he committed the offense. *State v. Rodriguez*, 192 Ariz. 58, 62, 961 P.2d 1006, 1010 (1998). A defendant's uncorroborated testimony may be sufficient to require an alibi instruction. *Id*.

To be effective, the defense must show that the defendant was at a place so far away or under such circumstances that he could not, with ordinary exertion, have reached the place of the crime in time to have participated in it. *Azhill v. State*, 19 Ariz. 499, 501, 172 P. 658, 659 (1918).

In *State v. Martin*, 2 Ariz.App. 510, 515, 410 P.2d 132, 137 (1966), the court found that Coolidge (where the crime took place) was not so far away from Phoenix (where the defendants said they were) that the defendants could not have arrived in Coolidge to participate in the crime. However, in *Rodriguez*, the defendant's testimony that he was home alone without the use of a car was sufficient to show that he was far enough away that he could not reach the crime scene. 192 Ariz. at 62, 961 P.2d at 1010.

It goes without saying that since the State is required to prove identity beyond a reasonable doubt, the State must also prove beyond a reasonable doubt the failure of the alibi defense.

C. Partial Alibi and Non-Presence

Importantly, the prosecutor should take note of the language of *Azhill* and *Martin*, which states

that in order to be an effective alibi defense, the evidence must demonstrate that the defendant was at some other place so far away, or under such circumstances that he could not, with ordinary exertion, have reached the scene of the crime in order to have participated in it. 19 Ariz. at 501, 172 P. at 659. Accordingly, partial alibis and evidence generally questioning identification will not warrant an alibi instruction. *See State v. Martin*, 2 Ariz.App. 510, 515, 410 P.2d 132, 137 (1966).

In *State v. Berry*, 101 Ariz. 310, 313, 419 P.2d 337, 341 (1966), the court held that where the alibi witness's testimony accounted for only part of the time during which the crime was alleged to have been committed, and where the evidence showed that for the remainder of the time the defendant was on the premises or had access to the crime scene, no instruction or alibi was required.

In *State v. Martinez*, 196 Ariz. 4551, 460, 999 P.2d 795, 804 (2000), the court held that the defendant was not entitled to an alibi or non-presence instruction when he failed to present evidence explaining his whereabouts on the day of the crime. Instead, he attempted to raise doubt as to identification of the car in which he was driving based on witness testimony that two similar cars were seen along the highway where the crime occurred.

D. Discovery

1. Disclosure of Alibi Witnesses

Rule 15.2(b) requires a defendant to disclose his intent to offer an alibi defense. The written notice requires the defendant to state the witnesses to be called in support thereof.

Because alibis are convincing and easy to fabricate, the rule is designed to "prevent the presentation of alibi defenses without giving the state the opportunity to ascertain the facts as to the credibility of the witnesses or to obtain rebuttal testimony." *State v. Dodd*, 101 Ariz. 234, 237, 418 P.2d 571, 574 (1966). The time limits for defense disclosure give the State some protection against fraudulent alibi claims made so close to trial as to prevent the State from investigating the credibility of the witnesses. *Id*. For that reason, courts may preclude such evidence unless good cause for the delay in filing the notice is presented. *Id*.

In *Wright v. Superior Court*, 110 Ariz. 265, 110 Ariz. 265 (1971), the court held that a lower court order requiring the defense to disclose names, addresses and statements of alibi witnesses was appropriate where the order also provided that the State was then required to provide a list of the names, addresses and statements of rebuttal witnesses that the State would rely upon to rebut the defendant's claim of alibi.

2. Indictment or Information

Whenever the State files an information or indictment, it may eschew an exact date for the charged offenses and opt to provide notice that the offense was committed "on or about" a certain date. This may present a challenge to a defendant seeking an alibi defense. Nevertheless, the defendant cannot compel the State to choose an exact date of the crime merely by asserting an alibi defense. *State v. Davis*, 206 Ariz. 377, 391, 79 P.3d 64, 78 (2003).

E. Impeachment of Alibi Witnesses

When a defendant relies on an alibi defense, impeachment evidence is "vitally important" to the State. *State v. Poland*, 144 Ariz. 388, 400,698 P.2d 183, 195 (1985). Therefore, it is important to thoroughly investigate the defense witnesses for evidence that will not only contradict or undermine the alibi itself, but will lead the jury to question the alibi witness' credibility.

The State may impeach an alibi witness by cross-examining an alibi witness on either credibility, including attempts to show the alibi was an afterthought or a fabrication. *State v. Jones*, 109 Ariz. 378, 380, 509 P.2d 1025, 1027 (1973).

F. Commenting on the Alibi Defense

In closing arguments, it may be prudent to comment about the lack of corroboration of the defendant's alibi. However, one should take care not to comment on a defendant's decision not to testify or talk to law enforcement. Sometimes, this will require a prosecutor to walk a fine line.

In *State v. Rutledge*, 205 Ariz. 7, 14, 66 P.3d 50, 57 (2003), the State played the defendant's videotaped interview with police in which he claimed he was with two women at the time the crime occurred. The defendant presented no other alibi evidence and did not testify. In his closing argument, the prosecutor questioned why the defendant did not give officers the names of the women he claimed he was with. The Supreme Court rejected the defendant's claim that this was an improper comment on the defendant's decision not to testify at trial, finding that the prosecutor's remarks were a comment on the lack of evidence to support the alibi defense.

G. Pre-Trial Investigation Tips

1. Interviewing the Witnesses

When it comes to meeting and effectively rebutting the alibi defense, the prosecutor should always bear in mind that if the defendant is truly guilty then the alibi witnesses will either be mistaken or lying. If the witness is lying, don't be timid about demonstrating that they are. If the witness is simply mistaken, bring this out, but do so carefully and without being overly aggressive or rude. Certainly anyone, including a jury, can understand how one could be mistaken.

The alibi witness should be questioned prior to trial. If he refuses, you can ask that he be ordered to submit to a deposition and/or comment upon his failure to give you a voluntary interview at the time of trial.

Whether pre-trial interview or testimony at trial, the witness should be questioned concerning his relationship with the defendant, whether he contacted the defendant or was contacted by the defendant, the length of time between the event, and the first contact and whether he made any attempt to contact law enforcement officials or the County Attorney's Office.

If the witness is a relative or a very close friend who was contacted by the defendant after an appreciable period of time and has made no attempt to tell the police or prosecutor that the defendant couldn't have committed the crime because he was elsewhere, the witness's testimony becomes a bit more suspect.

The witnesses should be questioned in great detail. Where was the defendant? Did the witness have the defendant under observation for the entire period of time -- even when he went to the restroom? How does the witness remember the date?

Ask each witness and the defendant who else was there. The witness, or defendant, may become fearful of your checking with those persons, and "forget" who else was there.

2. Investigating the Story

Often, the witness will remember the date, "because it was Aunt Jill's birthday", or, "my folks' anniversary", or, "Joe's Fourth of July party". Check these dates out.

In a case where the defendant tells the police he wasn't there, have the police contact any references listed on the defendant's initial appearance paperwork immediately. Have the officer or your investigator contact family, including the defendant's wife as soon as possible to nail down their whereabouts and knowledge of the defendant's whereabouts at the time of the offense before the defendant has time to concoct an alibi. Either the witness will refuse to discuss the case, assert a lack of knowledge or, at least, lock themselves into a story.

Check the defendant's visitor and telephone logs. If each and every alibi witness visits the defendant at the jail frequently, you may question them about this at trial. If they deny talking with the defendant, you will be able to produce the records to impeach their testimony.

If the alibi witnesses are too consistent - fabrication can be argued. If too inconsistent - an untruthful or mistaken basis can be suggested.

Check with employers concerning the defendant's hours of employment, days off, etc. Also, traffic or parking tickets can be used, if available, to refute the defense.

Finally, always remember that a partial alibi can be made to appear complete if not properly investigated.

VII. ENTRAPMENT

A. Entrapment as an Affirmative Defense

Entrapment was a common law defense in Arizona until 1997, when the state legislature codified entrapment as an affirmative defense. A.R.S. § 13-206 followed previous case law in setting forth the necessary elements of the defense:

> A. It is an affirmative defense to a criminal charge that the person was entrapped. To claim entrapment, the person must admit by the person's testimony or other evidence the substantial elements of the offense charged.
>
> B. A person who asserts an entrapment defense has the burden of proving the following by clear and convincing evidence:
>
> 1. The idea of committing the offense started with law enforcement officers or their agents rather than with the person.
>
> 2. The law enforcement officers or their agents urged and induced the person to commit the offense.

> 3. The person was not predisposed to commit the type of offense charged before the law enforcement officers or their agents urged and induced the person to commit the offense.
>
> C. A person does not establish entrapment if the person was predisposed to commit the offense and the law enforcement officers or their agents merely provided the person with an opportunity to commit the offense. It is not entrapment for law enforcement officers or their agents merely to use a ruse or to conceal their identity. The conduct of law enforcement officers and their agents may be considered in determining if a person has proven entrapment.

Before the enactment of the statute, the state had the burden of proving the defendant was not entrapped. *State v. McKinney*, 108 Ariz. 436, 440, 501 P.2d 378, 382 (1972). The Arizona Court of Appeals has upheld the constitutionality of A.R.S. § 13-206(B), which places the burden of proof on the defendant to prove the entrapment defense by clear and convincing evidence. *State v. Preston*, 197 Ariz. 461, 465, 4 P.3d 1004, 1008 (App. Div. 2 2000).

However, even though the defendant has the burden to prove the defense and must admit the elements of the charged offense, the trial court must still instruct the jury on the presumption of innocence and the state's burden of proof. *Id*. at 467, 4 P.3d at 1010.

B. Proving the Entrapment Defense

Entrapment has been defined as activity by the State in the nature of an inducement to commit a crime which the defendant would not otherwise have committed. *McKinney*, 108 Ariz. at 439, 501 P.2d at 381.

1. Admission of the Elements of the Crime

In Arizona, in order to avail himself of the entrapment defense, the defendant must admit each and every element of the offense. A.R.S. § 13-206(A); *State v. Nilsen*, 657 P.2d 419, 657 P.2d 419 (1983). However, he need not testify. *Id*. He may offer to stipulate to the elements and if the State refuses the stipulation, he may have his admission of the elements read into evidence. *Id.*

If the defense of entrapment is successfully raised by the defendant, the State has the burden of proving beyond a reasonable doubt that there was no entrapment. *McKinney*, 108 Ariz. at 440, 501 P.2d at 382; *State v. Bean*, 119 Ariz. 412, 414, 581 P.2d 257, 259 (App. Div. 2 1978).

The entrapment defense is generally a question for the jury. However, if entrapment is found, as a matter of law, the defendant is entitled to a directed verdict of acquittal. *State v. Cox*, 110 Ariz. 603, 522 P.2d 29 (1974).

2. Law Enforcement Officer or their Agent

The idea to commit the offense must originate with a law enforcement officer or his agent. A.R.S. § 13-206(B)(1). Typically, an agent of law enforcement will be an informant.

A third person involved in the action will be considered a police agent only if the police authorized his actions by word or conduct. *State v. Hernandez*, 200 Ariz. 530, 532, 29 P.3d 877, 879 (App. Div. 1 2001). The mere fact that a third party worked with law enforcement in the past is insufficient to establish that the person was acting under the direction or supervision of law enforcement. *Id*.

3. Inducement to Commit the Crime

Providing a mere opportunity to commit the crime is not entrapment; entrapment must be the product of creative activity by law enforcement officials. *See State v. Rocha-Rocha*, 188 Ariz. 292, 295-96, 935 P.2d 870, 873-74 (App. Div. 1 1996); *State v. Monpano*, 117 Ariz. 145, 147, 571 P.2d 291, 293 (App. Div. 2 1977).

The question is not whether the police conduct would induce a reasonable man to commit the offense. The question is whether the conduct, in fact, induced the defendant to commit a crime contrary to his normal inclinations. *State v. Kaiser*, 26 Ariz.App. 106, 110, 546 P.2d 831, 835 (App. Div. 2 1976).

4. No Predisposition to Commit the Crime

The defendant must also prove with clear and convincing evidence that he had no predisposition to commit the offense before being approached by law enforcement to do so. A.R.S. § 13-206(B)(3). To rebut this element of the defense, the State may introduce evidence of prior bad acts of a similar nature to show intent and predisposition. *State v. Petralia*, 110 Ariz. 530, 535, 521 P.2d 617, 622 (1974.

5. Inconsistent Defenses

Under A.R.S. § 13-206(B), the defendant cannot plead inconsistent defenses. *McKinney*, 108 Ariz. at 464, 4 P.3d at 1007. That is why the defendant cannot deny knowledge of the crime and simultaneously plead the defense of entrapment. *State v. Mendoza*, 109 Ariz. 445, 447, 511 P.2d 627, 629 (1973); *State v. McKinney*, 108 Ariz. 436, 439, 501 P.2d 378, 381 (1972).

In *State v. Vitale*, 23 Ariz.App. 37, 43, 530 P.2d 394, 400 (App. Div. 2 1975), the court held the defendant could not plead that he had no knowledge that the goods were stolen, in an attempted receiving stolen property case, while at the same time arguing entrapment.

In *State v. Downing*, 171 Ariz. 431, 432, 831 P.2d 430, 433 (App. Div. 1 1992), the court upheld the trial judge's refusal to instruct on entrapment where the defendant also claimed that the officers who testified against him were lying in order to frame him for the crime.

C. Entrapment as a Matter of Law

"[W]here the evidence raises a substantial and reasonable defense of entrapment and the State does nothing to rebut or contradict the defense, entrapment as a matter of law is established." *McKinney*, 108 Ariz. at 441, 501 P.2d at 383.

Entrapment as a matter of law exists where the evidence shows that the patently excessive police conduct overbore the defendant's will, and clearly was the cause of the crime. *See State v. Boccelli*, 105 Ariz. 495, 496, 467 P. 2d 740, 741 (1970)(entrapment as a matter of law established where the informant had given his marijuana to the defendant and told him to hold it until ho could get a buyer, at which time an undercover agent knocked and offered to buy the marijuana). *See also State v. Fox*, 110 Ariz. 77, 515 P.2d 322 (1973)(entrapment as a matter of law).

In *Petralia*, the court found that there was no entrapment as a matter of law, even though the State's agents supplied the plan, the buyer and the money for the purchase. 110 Ariz. at 538, 521 P.2d at 624. *See also Cox, supra*(no entrapment as a matter of law, where informants set up sale

between predisposed persons); *State v. Cotton*, 103 Ariz. 408, 443 P.2d 404 (1968); *State v. Rabon*, 100 Ariz. 344, 414 P.2d 726 (1966); *State v. Sanchez*, 25 Ariz.App. 228, 542 P.2d 421 (App. Div. 1 1975).

D. Entrapment as a Question for the Jury

Generally, absent a showing of patently offensive police conduct, the question of entrapment is for the jury, with conflicts in testimony to be resolved in favor of the State on the question of submission to the jury. *Petralia*, 110 Ariz. at 538, 521 P.2d at 624.

If the intent to commit the crime originates in the defendant's mind, no entrapment instruction is required. *State v. Reyes*, 99 Ariz. 257, 262, 408 P.2d 400, 403 (1965); *State v. Fassler*, 108 Ariz. 586, 503 P.2d 807 (1972); *State v. Chudy*, 108 Ariz. 23, 492 P.2d 402 (1972).

On the other hand, it is error to refuse the requested entrapment instruction where the testimony supports the defense at face value, even if the defendant's testimony is contradicted by other evidence. *State v. Martin*, 106 Ariz. 227, 229-30, 474 P.2d 818, 820-21 (1970).

E. Entrapment as a Grand Jury Matter

The State is not required to present an entrapment instruction to the grand jury because it need not anticipate every defense. However, when a grand juror asks a question regarding possible entrapment, the State has an obligation to respond in an accurate fashion to the grand jurors' questions. *Francis v. Sanders*, 222 Ariz. 423, 215 P.3d 397 (App. Div. 1 2009).

F. Informant Issues

Sometimes in entrapment cases, an informant is involved. Under *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623 (1957), an informant must be disclosed where he is a material witness to the transaction, or is probably possessed of information relating to the defendant's claim of entrapment.

1. Disclosure of a Confidential Informant

The burden of showing that the informant has material information falls on the defendant. *State ex rel. Burger v. Superior Court*, 106 Ariz. 470, 474, 478 P.2d 94, 98 (1970). The defendant must show that the informant is likely to have evidence and nondisclosure would deny the defendant a fair trial. *State v. Martinez*, 15 Ariz.App. 430, 489 P.2d 277 (App. Div. 1 1971); *State v. Castro*, 13 Ariz. App. 240, 475 P.2d 725 (App. Div. 1 1970).

The mere possibility or hope that the informant might have useful and relevant testimony is insufficient to overcome the State's privilege of maintaining the confidentiality of the informant. *Resnick v. State*, 24 Ariz.App. 513, 540 P.2d 132 (App. Div. 2 1975). The test for disclosure is a balancing test. *State v. Benge*, 110 Ariz. 473, 520 P.2d 843 (1974). That is, the court must balance "the public interest in protecting the flow of information against the individual's right to prepare his defense", taking into consideration the crime, possible defenses, possible significance of the informer's testimony, and other relevant factors. *Martinez*, 15 Ariz.App. at 432, 489 P.2d at 279, citing *Rovario*, 353 U.S. at 62.

2. Relevant Testimony

"[W]hen the informant was present at the time of, or participated in, the commission of the crime charged, then he would be a material witness on the issue of defendant's guilt and his identity

must be disclosed." *Martinez*, 15 Ariz.App. at 432, 489 P.2d at 279.

The fact that informants arrange sales and sometimes keep some of the substance for themselves is not relevant to entrapment. *State v. Massengill*, 110 Ariz. 310, 311, 518 P.2d 560, 561 (1974); *Sanchez, supra.* Appropriate motions in limine should be filed by the prosecutor to preclude this type of testimony.

G. Reverse Buys

If the state provides all the ingredients of the offense, including the plan, the drugs, the buyer, the purchase money and the intent to make the sale, the court will consider that entrapment. *State v. Boccelli*, 105 Ariz. 495, 496, 467 P. 2d 740, 741 (1970). For example, in *McKinney*, the state provided the defendant with drugs through an informant, and the informant initiated contact with undercover officers to arrange the defendant's sale of the drugs to the undercover officer. 108 Ariz. at 438, 501 P.2d at 380.

However, the mere fact that the defendant purchased drugs from an undercover officer does not constitute entrapment where officers did not direct the defendant to purchase or sell drugs and did not attempt to arrange a second sale to an agent. *State v. Rocha-Rocha*, 188 Ariz. 292, 296, 935 P.2d 870, 874 (App. Div. 1 1996).

H. Investigating the Entrapment Defense

One of the more important areas to consider in meeting the entrapment defense is the defendant's former history. If possible, have evidence that the defendant, who is charged with the unlawful sale of cocaine, for example, has on fifteen prior occasions, sold cocaine to informants and others.

Attempt to tape-record the conversations between defendants and informants which demonstrate the defendant's predisposition.

VIII. IGNORANCE OR MISTAKE OF FACT

A. Negation of Culpable Mental State

A.R.S. § 13-204(A) provides that ignorance or a mistake of fact can constitute a defense if it negates the culpable mental state required for the commission of the offense, or it supports a defense of justification. For example, if a defendant removes a coat from a building, believing it to be her own because it is similar in appearance, she may claim the defense or ignorance or mistake of fact, inasmuch as the mistake of fact negates the culpable mental state required for the commission of the offense of theft.

Also, if "A" kills "B", thinking that "B" would kill him, his mistake or ignorance of fact may excuse his killing of "B" if his mistake is reasonable. That is, if a reasonable person would believe that the killing of "13" was necessary, then the defendant may be entitled to an ignorance or mistake of fact defense.

Mistake of fact is relevant to negate a culpable mental state that the State is required to prove. Mistake of fact is not relevant to affirmative defenses. State v. Young, 192 Ariz. 303, 307, 965 P.2d 37, 41 (App. Div. 1 1998)(defendant's mistaken belief that gun was permanently inoperable irrelevant because inoperability is an affirmative defense to misconduct involving weapons

offense).

B. Other Act Evidence

The state may introduce evidence of prior uncharged bad acts to show that there was no ignorance or mistake of fact on the defendant's part. Hill v. State, 19 Ariz. 78, 86, 165 P. 326, 329 (1917). If the prosecutor intends to introduce such acts at trial, be aware that they must conform to the requirements of Rule 404(b).

C. Mistake of Fact and Justification

A.R.S. § 13-204(A)(2) permits a mistake of fact defense if it supports a justification defense. In such a case, however, mistake of fact is not a separate defense. Consequently, the trial court need not give a mistake of fact instruction where it is embodied by the instruction on self-defense. *State v. Lamar*, 144 Ariz. 490, 497, 698 P.2d 735, 742 (App. Div. 2 1984).

IX. INTOXICATION

A. Relevant Statutes

Initially, it should be pointed out that intoxication is not a defense to any criminal offense and may not be considered as it relates to specific intent or a particular culpable mental state. *State v. Sharp*, 193 Ariz. 414, 423, 973 P.2d 1171, 1180 (1999).

Previously, voluntary intoxication could negate a culpable mental state, but in 1993, A.R.S. § 13-503 was amended to provide as follows:

> Temporary intoxication resulting from the voluntary ingestion, consumption, inhalation or injection of alcohol, an illegal substance under chapter 34 of this title or other psychoactive substances or the abuse of prescribed medications does not constitute insanity and is not a defense for any criminal act or requisite state of mind.

A.R.S. § 13-105(42) defines "voluntary intoxication" as "intoxication caused by the knowing use of drugs, toxic vapors or intoxicating liquors by a person, the tendency of which to cause intoxication the person knows or ought to know, unless the person introduces them pursuant to medical advice or under such duress as would afford a defense to an offense." What this means is that intoxication is only a defense in the limited circumstances where the defendant was impaired (1) by the proper use of prescribed medication or (2) under circumstances of duress that may also constitute involuntary intoxication.

The statute provides that temporary intoxication is not a defense for a criminal act or requisite state of mind if it results from the abuse of prescribed medications. However, a defendant may assert a temporary intoxication defense based on the non-abusive use of prescription medication to negate a requisite state of mind. *State v. McKeon*, 201 Ariz. 571, 574, 38 P.3d 1236, 1239 (App. Div. 1 2002).

B. Involuntary Intoxication

Care should be taken to distinguish between voluntary and involuntary intoxication. Whereas voluntary intoxication is not a defense, involuntary intoxication can be a defense if the intoxication exists to such an extent as to affect the defendant's reason, and deprive him of an understanding and appreciation of the nature and consequences of his act. *Burrows v. State*, 38 Ariz. 99, 115, 297 P. 1029, 1035 (1931), overruled on other grounds by *State v. Hernandez*, 83 Ariz. 279, 320 P.2d 467 (1958).

Involuntary intoxication is not an affirmative defense. It is a defense that "denies an element of the offense charged or denies responsibility". *State v. Edmisten*, 220 Ariz. 517, 521, 207 P.3d 770, 774 (App. Div. 2 2009. Accordingly, the burden of proof remains on the state to prove beyond a reasonable doubt that the defendant is guilty of the offenses charged, including proving the requisite mental state. *Id*. *But see McKeon*, 201 Ariz. at 580, 38 P.3d at 1245 (In his concurrence, Judge Hall suggests temporary intoxication could be raised as a form of temporary insanity, which would shift the burden of proof).

C. Intoxication and Voluntariness of Statements

Intoxication can be used in an attempt to demonstrate the involuntary and inadmissible nature of statements made by a criminal defendant. Generally, proof that the defendant was intoxicated at the time he confessed will not, without more, prevent the admissibility of his confession. However, if it is shown that defendant was "intoxicated to such extent that he was unable to understand the meaning of his statements, then the confession is inadmissible." *State v. Clark*, 102 Ariz. 550, 553, 434 P.2d 636, 639 (1967).

D. Insanity Due To Alcoholism

A defendant may entitled, if able, show "mania a potu." That is, that the long and continuous use of intoxicants has weakened his mind to such an extent that he suffers from an organically related insanity. *Territory v. Davis*, 2 Ariz. 59, 66, 10 P. 359, 363 (1886).

With respect to the question of "mania a potu", or "pathological intoxication", a foundational requirement may be that the defendant demonstrate some organically based difficulty. Importantly, any degree of voluntary ingestion of alcohol or drugs or any extent of voluntary intoxication will negate the defendant's right to have the jury instructed on insanity based upon pathological intoxication. *See United States v. Henderson*, 680 F.2d 659, 664 n.3 (9th Cir. 1982)("If the initial drinking is involuntary, then the resulting mental disability was not brought about by circumstances within the control of the defendant."); *Kane v. United States*, 399 F.2d 730, 736 (9th Cir. 1966).

If such a defense is raised, a psychiatrist cannot testify concerning the effects of intoxication upon the ability of the defendant to form a particular kind of intent or culpable mental state. *State v. Laffoon*, 125 Ariz. 484, 486, 610 P.2d 1045, 1047 (1980). However, an expert witness can testify as to the effects of an intoxicant upon the body, generally. *State v. Betancourt*, 131 Ariz. 61, 638 P.2d 728 62, 729 (App. Div. 2 1981).

E. Investigating an Intoxication Defense

If there is any indication at all that the defendant has ingested alcohol or drugs, the investigating officer should attempt to secure a blood-alcohol test. The test will give some indication of whether the defendant has been drinking, and to what extent. If drugs are involved, the blood samples taken at the time of the arrest may be crucial. Some drugs can be detected even after several days. Insure that the defense is notified of the existence of the blood samples and test results as early as possible. If the defendant refuses to provide a breath or blood sample and later claims to have been intoxicated, at least the defense won't be able to attack on the basis of your failure to secure or attempt to secure this type of evidence and you'll be able to put into evidence the fact of his refusal.

Have the arresting officers detail in their reports the defendant's mannerisms, speech, responsiveness to questions and behavior at and near the time of the incident.

Secure taped interviews of all available witnesses concerning the defendant's behavior and state of sobriety.

Talk with friends and relatives concerning the defendant's tolerance of alcohol and/or drugs, and his manner of behavior while under the influence.

Check the defendant's background, medical and criminal, for prior intoxicated behavior. Care should be taken to insure that no doctor-patient treatment privilege is violated in securing this type of information.

Have the arresting officers and transporting officers carefully document each and every statement by the defendant - no matter how innocuous.

Secure evidence and testimony concerning how the defendant behaved when arrested, whether he attempted to flee or explain away his conduct. Did he try to hide contraband or stolen items? Was he driving? Who had he been with prior to the offense?

Attempt to ascertain what and how much in the way of intoxicants the defendant consumed prior to the incident. At the time of trial, if the defendant testifies, question on the issue of intent or culpable mental state.

Be careful of intoxication or insanity defenses when you have a flaky victim or flaky facts and a sympathetic defendant. These situations lend themselves to jury nullification.